

Thursday, June 16.

OUTER HOUSE.

[Lord Fraser, Ordinary.]

RUTHVEN v. HAMILTON'S CURATOR BONIS.

Lands Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. c. 19), sec. 67—Railways Clauses Consolidation (Scotland) Act (8 and 9 Vict. c. 33), sec. 71—Entail—Application of Consigned Compensation Money for Unworked Seams of Coal.

An heiress of entail in possession held (per Lord Fraser, Ordinary) entitled to uplift and acquire in fee-simple a sum of £653 which had been consigned in bank by a railway company as the amount of compensation due to her as heiress of entail in respect of certain pillars of coal under her lands which had been left unworked on their demand in terms of the Railways Clauses Act, on the ground that this sum came in lieu and place of the lordships which would, if the coal had been worked out in ordinary course, have been paid over to the heiress of entail by her mineral tenant prior to the date at which compensation actually took place.

The Caledonian Railway Company obtained by virtue of their Acts a conveyance of about two and a-half acres of ground of the entailed lands of Barncluith from the Baroness Ruthven, heiress of entail in possession of said lands. The conveyance contained this clause—"But reserving always the minerals lying under the land before disposed, in terms and upon the conditions of The Railways Clauses Consolidation (Scotland) Act 1845." The said Railways Clauses Act (8 and 9 Vict. cap. 33), sec. 70, provides—"The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any lands purchased by them, except any such parts thereof as shall be necessary to be dug or carried away, or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lauds unless they shall have been expressly named therein and conveyed thereby;" and also sec. 71—that "If the owner, lessee, or occupier of any mines or minerals lying under the railway or other works connected therewith, or within the prescribed distance, or when no distance shall be prescribed, 40 yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appears to the company that the working of such mines, either wholly or partially, is likely to damage the works of the railway, and if the company be desirous that such mines, or any parts thereof, should be left unworked, and if they be willing to make compensation for such mines and minerals, or such parts thereof as they desire to be left unworked, they shall

give notice to such owner, lessee, or occupier of such their desire, and shall in such notice specify the parts of the mines under the railway or works, or within the distance aforesaid, which they shall desire to be left unworked, and for which they shall be willing to make compensation; and in such case such owner, lessee, or occupier shall not work or get the mines or minerals comprised in such notice; and the company shall make compensation for the same, and for all loss or damage occasioned by the non-working thereof, to the owner, lessee, or occupier thereof respectively; and if the company and such owner, lessee, or occupier do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation."

By lease dated 9th March and 8th July 1874, Lady Ruthven let to Archibald Russell, coal-master, Glasgow, certain seams of coal lying under the said lands of Barncluith, for twenty-one years from and after March 1873, and for payment to her of the lordships therein stipulated. Mr Russell having begun to work on 3d August 1876, intimated to the railway company that his workings had come within the prescribed distance of their railway, and after due inspection in terms of the Act the company gave notice to Mr Russell and to Lady Ruthven that they desired to have left unworked certain specified pillars of coal. The company subsequently settled with Mr Russell the amount of his compensation in respect thereof, and the amount of compensation due to Lady Ruthven was fixed by valuers, in terms of the Lands Clauses Act, at £653, 12s. 1d., which sum was deposited in bank in her name by the company.

Lady Ruthven presented a petition for warrant to uplift and acquire this sum of money in fee-simple.

The petition stated, *inter alia*, that if the said company had not given notice that they desired the said pillars of coal to be left unworked, Mr Russell would have had them all worked out, and would have paid the lordships due in respect of them to the petitioner before the date at which consignment took place, and an affidavit to that effect by Mr Russell was produced.

The Lord Ordinary (FRASER) remitted to Mr John Galletly, S.S.C., to inquire into the circumstances and to report.

An objection was stated before him on behalf of the *curator bonis* of the next heiress of entail in the said lands, to the effect that the consigned price of the coal in question being really part of the capital of the entailed estate, and not income, Lady Ruthven was not entitled to acquire it otherwise than for the purposes set forth in sec. 67 of the Lands Clauses Acts. Mr Galletly, however, considered that the consigned sum "clearly comes in lieu and place of the said lordships, and that as the latter are without doubt part of the annual rents or profits of the entailed estates which the petitioner as heiress of entail in possession is entitled to, she is equally entitled to the consigned sum for her own use and behoof," and reported favourably to the granting of the petition.

The Lands Clauses Consolidation (Scotland) Acts 1845 (8 and 9 Vict. cap. 19) provides (sec. 67) that "The purchase-money or compensation which shall be payable in respect of any lands or any

interest therein, purchased or taken by the promoters of the undertaking from any corporation, heir of entail," shall, if over £200, be consigned in bank, to be applied, subject to the authority of the Court, to some one or more of the following purposes, viz., "In the purchase or redemption of land tax, or the discharge of any debt or incumbrance affecting the land in respect of which such money shall have been paid: . . . In the purchase of other lands to be conveyed, limited, and settled upon the same heirs, and the like trusts and purposes, and in the same manner as the lands in respect of which such money shall have been paid stood settled; or, If such monies shall be paid in respect of any buildings taken under the authority of this or the Special Act, or injured by the proximity of the works, or in removing or replacing such buildings, or substituting others in their stead, or in such manner as the said Court shall direct; or In payment to any party becoming absolutely entitled to such money."

The Lord Ordinary having heard counsel for the petitioner, and also for the *curator bonis* of the next heiress of entail, granted warrant in terms of the prayer of the petition.

His Lordship added this note—"The Lord Ordinary is of opinion that the petitioner in this case is entitled to uplift the money paid for the coal by the railway company, and this by reason of the last part of the 67th section of the Lands Clauses Consolidation (Scotland) Act, by which it is directed that the money shall be applied 'in payment to any party becoming absolutely entitled to such money' The petitioner was entitled to work out, either by herself or by her tenants, the coal which she was compelled to leave under demand of the railway company. If she worked her coal by means of tenants, her return was in the shape of a lordship, and unless she obtains the consigned fund as prayed for in the petition, she will not obtain a lordship in reference to the coal so left. The distinction between agricultural ground and minerals below is obvious enough. The former may go on for ever yielding agricultural produce; it is not consumed in the use, and the taking it away from the estate by the railway company is a permanent depreciation of the agricultural value of the land. Hence it was only right and proper to look upon compensation given by a railway company for such surface abstraction from the estate as a fund paid for the benefit of the estate, and not for the then heir in possession—a fund, therefore, which ought only to be applied to the improvement of the estate in one or other of the ways pointed out in the 67th section of the Lands Clauses Act. But with regard to minerals the case is different. They can only be enjoyed by successive heirs of entail by consumption of the *corpus*, and the *corpus* of a coal-seam wrought out in a fair and reasonable way belongs to the heir of entail in possession. That *corpus* was taken away in the present case by the railway company, and the compensation paid therefor ought in justice to pertain to the heir of entail, who lost this source of revenue in the shape of lordships. In this case, if the railway company had not intervened and paid the money, the coal would have been wrought out and the lordships received, and the petitioner by getting the consigned fund only obtains by the payment of

one lump sum the same amount of income which she would have got from her own tenant."

In this interlocutor the parties acquiesced.

Counsel for Petitioner—Thorburn. Agents—Hope, Mann, & Kirk, W.S.

Counsel for *Curator Bonis*—Dundas. Agents Dundas & Wilson, C.S.

Tuesday, July 12.

OUTER HOUSE.

[Junior Lord Ordinary.

HUTCHISON, PETITIONER.

Curator Bonis—Minor Pubes—Appointment by Court.

In a petition praying for the appointment of a *curator bonis* to two children, minors who had attained puberty, presented by their elder sister, the Court made the appointment on production of letters from the minors concurring in the application.

This was an application presented by Susan Buttar Hutchison praying for the appointment of a *curator bonis* to Thomas Hutchison and John Hutchison, her brothers. Under a previous application in 1872 the Court had appointed a *curator bonis* to the present petitioner, and a factor *loco tutoris* to her three brothers Alexander, Thomas, and John. When the petitioner attained majority in 1879 the person so appointed was discharged of his office *quoad* her estate, and on Alexander attaining majority in February 1881 a petition for discharge in so far as his estate was concerned was presented by the factor. Before the procedure in this petition was completed the factor died, and the present application was presented for discharge of the late factor and his representatives, and the appointment of a person named as *curator bonis* to Thomas and John Hutchison, who were now past pupillarity. The value of the estate was somewhat less than £400.

The Lord Ordinary (FRASER) having called attention to the doubts expressed by the First Division of the Court as to the competency of appointing a *curator bonis* to a *minor pubes*, the petitioner undertook to obtain a written concurrence from each of the minors, and craved the Lord Ordinary thereafter to make the appointment.

Authorities—*Mayne*, March 11, 1853, 15 D. 554, Lord Ivory's opinion; *Accountant of Court v. Buchanan*, March 3, 1854, 16 D. 717; *Fraser on Parent and Child*, 458; *Thoms on Judicial Factors* (Fraser's ed.), 255.

Written concurrence having been produced, the Lord Ordinary made the appointment.

Counsel for Petitioner—Gillespie. Agents—Magregor & Co., S.S.C.